

Memorandum

December 19, 2011

To: File

From: Carol Piening

Subject: Notes from 11/16/2011 Meeting on WDFW HPA Rule Revisions

Organization representatives present:

Stephen Bernath, Washington Department of Ecology
Robert RC Cunningham, Northwest Treasure Supply
Ralph Ferguson, NECAP
Russ Jones, representing eastern Washington private property interests
Gayle Kreitman, NOAA Fisheries
Christina Martinez, Washington State Department of Transportation
Robert Meier, Rayonier
John Stuhlmiller, Washington Farm Bureau (by telephone)
Bill Thomas, Washington Prospectors Mining Association
Dale Tyler, Camano Water Systems Association
Lance Winecka, Regional Fish Enhancement Groups

Interested others present:

Dave Molenaar, NOAA Fisheries

WDFW staff present:

Pat Chapman
Jeff Davis
Carol Piening
Randi Thurston

Anne Knapp, Governor's Office of Regulatory Assistance, facilitated. Alan Bogner, Governor's Office of Regulatory Assistance, joined the meeting about halfway through.

Agenda Items:

Topic	Status
Entire rule	Open discussion

Follow-ups:

WDFW will:

- Work on a second draft, to be available by mid-January. Jeff Davis noted that, depending on the number of comments WDFW receives, this date may slip.
- Share a more-extensive list of possible project types for simplified permits.

Interested parties will:

- Provide comments to WDFW as soon as possible to facilitate work on a second draft; the deadline for written comment is December 23, 2011.

Agenda Topic Discussions

Anne Knapp, Governors Office of Regulatory Assistance, introduced herself as substitute facilitator. During a round of introductions, new participants introduced themselves and identified their interests:

- Ralph Ferguson, concerned about coordination of permits, and the effects of HPAs on groundwater issues;
- Russ Jones, property owner and sailor interested in the interactions between HPAs, compensatory mitigation, and public access;
- Robert Meier, Rayonier, forest policies manager; and
- Dale Tyler, interested in the effects of HPAs on safe drinking water.

Here is a brief status summary of “Marina/ Parking Lot” topics:

- Electronic signatures: WDFW is looking into this. In addition, the governor has “asked state agencies to begin implementing...using electronic signatures on bids and authorized state contracts...”
 - WDFW has accepted emailed applications for the past couple of years, and is including that possibility in the draft rule revisions.
 - The Department of Ecology has found that electronic security for electronic signatures can be cumbersome.
- Formalizing “pre-application” process: this is under discussion.
- Statutory issues with “changed conditions” (030 (27)): This section now incorporates statutory language about changed conditions.

- Additions to exemptions (035):
 - Participants suggested both removing and retaining the exemption in (4) for landscape management plans.
 - Participants suggested both formalizing an exemption and continuing with current practices for temporary structures such as those built by children at play.
 - Participants noted that “simplified” permits may inspire additional ideas for “exemptions.”
- Rules and HCP conservation measures: The rule revisions will form the basis for conservation measures in the HCP.
- HCP funding: The Services recognize that government agencies cannot make long-term funding commitments. If funding for the HCP is suspended, incidental take coverage is also suspended. WDFW is acutely aware of funding limitations and will keep them in mind while developing the HCP.
- Stakeholder input on HCP: If, in discussion with the Services, WDFW learns that additional conservation measures would be necessary, WDFW will return to advisors and tribes for more input. WDFW is communicating with various groups to find out how much support there is for the HCP.
- Amphibian removal protocols: According to WDFW amphibian biologists, there are none. Developing any is outside the scope of HPA revisions.

Other topics that were discussed are summarized by topic, below.

Coordination among permitting agencies

Participants raised the following points:

- Each agency has authority granted by the legislature, and so each agency is limited in the actions it can take. The focus of this rulemaking is limited to “protection of fish life”, as stated in WDFW’s legislative authority. WDFW continues to work with several agencies to identify potential gaps in protection of fish life, and overlaps in jurisdiction. Work that is underway includes:
 - WDFW and Ecology: 401 and 402 (Clean Water Act) and HPA permit requirements.
 - WDFW and WSDOT: HPAs for transportation construction and maintenance.
 - WDFW and USFS: hydraulic projects conducted by the Forest Service.
 - WDFW and DNR: forest practices and HPA requirements.
 - WDFW and US Army Corps of Engineers: Corps permits and HPA requirements; coordination with Ecology as they implement federal authority.
 - WDFW and counties: shoreline permits. The Office of Regulatory Assistance also has a pamphlet to help applicants for docks understand requirements.

- Sometimes it seems that state agencies coordinate in order to prevent private enterprise. The public needs assurance that this doesn't happen.
- Consider clarifying the relationship between the Puget Sound Partnership and WDFW.
- Irrigation and drinking water are legally protected uses; impacts on drinking water and farmland must be considered when permitting salmon restoration projects.
 - While SEPA is meant to be the tool for considering the broader impacts of projects, not all participants are convinced that it works as intended.
 - Participants suggested that WDFW work with the Corps and DOH specifically on drinking water protection. However, WDFW's HPA authority does not allow this.
 - Participants also suggested that a thorough analysis of all a projects' impacts should be completed before any tax money is spent on salmon recovery projects.
 - Participants also stated that salmon recovery projects are a small proportion of annual HPAs, and reiterated from an earlier meeting that a discussion of "size and scale" for streamlining will take place separately from these rule revision discussions.
 - Participants expressed frustration with the quality and quantity of research that is associated with salmon restoration projects.
- WDFW's HPA program does not have jurisdiction over commercial geoduck harvest.

Stream crossings

Participants raised the following points:

- NCASI (National Council for Air and Stream Improvement?) is doing research to show that properly-installed corrugated culverts allow fish movement. Such culverts are less expensive than the stream-simulation standard proposed in the draft rule. Retaining existing culverts can minimize environmental impacts by keeping heavy equipment out of streams.
- WDFW has some data related to stream simulation culverts.
 - Published and unpublished performance data
 - Some information on fish counts above previous barriers
 - A study of "lifetime costs" – installation, maintenance, replacements needed due to storm damage – is under discussion.
 - WDFW should consider cost/benefit ratios, and should rely on peer-reviewed science.
- "Protecting fish life" includes maintaining habitat by allowing sediment and large wood, as well as fish, to pass through culverts.
- WDFW's water crossing guidance is not yet final; comments on it are due January 4.

Endangered Species Act and fish

Participants raised the following points:

- When making decisions about managing ESA-listed species, choosing a baseline condition is very important. One participant suggested that the baseline should be when the Endangered Species Act was passed.
- In addition to environmental concerns, there are economic benefits from fisheries.

Compensatory mitigation (220-110-036 (5))

Participants raised the following points:

The rule states a compensatory mitigation ratio of 1.1:1. This should be related to the impact of the project, rather than the footprint of the project itself.

- WDFW is interested to see if the draft mitigation guidance is helpful with issues such as this.

HPAs for routine maintenance (220-110-037(1)(a))

Participants raised the following points:

- People have questions about what constitutes “de minimus” maintenance. WDFW is working on this question.
 - For example, WDFW and Ecology are discussing the extent to which concerns for the protection of fish life are met by NPDES permits.
 - Earlier meetings have included discussion of what constitutes “routine” maintenance, and WDFW welcomes further input on this topic.
- Burdensome permitting requirements may result in delayed maintenance. Efficiencies result in lower cost, lower maintenance, and better protection of fish life.
- Dikes undergo routine maintenance; WDFW should take into account the length of time they have been in place and related environmental changes when considering changes to dikes.

Piers, ramps, and floats (220-110-065)

Participants raised the following points:

Light penetration

- Light penetration is important in some ecosystems for vegetation and for movement of fish along shorelines. In some ecosystems, notably freshwater lakes without anadromous fish, light penetration should be considered less important. In addition, grating that

allows 60% light transmission is uncomfortable on bare feet. Consider taking site-specific factors into account, rather than setting a one-size-fits-all standard.

Grounding of floats

- In some waterbodies, especially those with variable pools such as Lake Chelan, requirements to prevent grounding of floats would greatly impact access and have no benefit to fish life. In unsheltered areas, float stoppers don't work. Float stoppers mounted on the float tend to dig into the substrate over time. Installation of piles that incorporate float stoppers impacts fish life. The "nearshore" of variable pool lakes and impoundments contains little-to-no fish habitat if there is no water for a significant part of the year.

Pilings

- Specifying 20-foot spans between pilings might not be appropriate in all water bodies. Consider the underlying intent, for instance to span intertidal areas where forage fish spawn. Also consider whether to set a standard and then rely on exemptions; some biologists are reluctant to allow exemptions.

Simplified applications

- WDFW has not yet developed a list of potential projects that would be eligible for a "simplified" application. When a list is available, it will be shared with this group.
- If "simplified" applications resulted in less scrutiny of the broader issues that could be associated with a project, that would be an unacceptable outcome.

Mitigation guidance

- Participants suggested both requiring a cash bond on HPAs, and opposed this suggestion.
- Mitigation guidance was first envisioned as a tool for WDFW staff, to improve protection and consistency. Many people, including tribes, environmental organizations, and the regulated community, have expressed interest in the guidance. It will go through a public process.